

Appleway Chevrolet, Inc. and Driver Salesmen, Warehousemen, Food Handlers, Clerical and Industrial Production; Spokane & Vicinity, Washington & the Five Northern Counties of Idaho, Local #582, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. Case 19-CA-13671

October 28, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND
MEMBERS FANNING AND HUNTER

On May 24, 1982, Administrative Law Judge Jay R. Pollack issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and counsel for the General Counsel filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and

¹ Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). In particular, Respondent excepts to the Administrative Law Judge's crediting of Union Business Agent DeLauder over Respondent Dealer Tim Pring with regard to whether Tim Pring told DeLauder on his June 22 visit that two other salesmen (Arthur and Berry) also had been terminated. Respondent cites *M & S Company, Inc.*, 108 NLRB 1193, 1194 at fn. 3 (1954), for the proposition that the Administrative Law Judge erred in failing to articulate his reasons for arriving at this particular credibility resolution. The Board has held consistently that when "credibility resolutions are not based primarily upon demeanor . . . the Board itself may proceed to an independent evaluation of credibility." *J. N. Ceazan Company*, 246 NLRB 637, 638 at fn. 6 (1979), and cases cited therein. When the demeanor factor is diminished, the choice between conflicting testimony rests not only on demeanor, but also on the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole. *El Rancho Market*, 235 NLRB 468, 470 (1978), *enfd.* 603 F.2d 223 (9th Cir. 1979). We have examined the record carefully and find no basis under either standard for reversing the Administrative Law Judge's credibility resolution with regard to the DeLauder-Tim Pring conversation. See *Garrett Railroad Car & Equipment, Inc.*, 244 NLRB 842 at fn. 1 (1979).

Respondent also takes exception to the Administrative Law Judge's description that Jack Pring had "turned over operation of the dealership to his son Tim." The record reveals that, although Tim Pring is not the official dealer of record, he was named dealer in February 1981 and charged with the overall operation of the facility. Because the Administrative Law Judge in no way indicated that Jack Pring had abdicated all of his responsibilities with respect to Respondent's operation, we find no merit in Respondent's exceptions to the Administrative Law Judge's portrayal of Tim Pring's job function.

We note that the Administrative Law Judge stated inadvertently that on June 20 McConahy complimented Arthur on his motorcycle sale. We correct his error by noting that this exchange took place early in the morning on June 22, before Union Business Agent DeLauder informed Tim Pring that a majority of the dealership's salesmen had signed authorization cards. We also note that the Administrative Law Judge erred in stating that Tim Pring had asked salesman Thomas Showalter who he

briefs and has decided to affirm the rulings, findings,¹ and conclusions² of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

Although we agree with the Administrative Law Judge's findings that Respondent violated Section 8(a)(3) and (1) of the Act in discharging Fred Arthur, Bill Berry, and Paul Goetz, Jr., we modify his analysis of the factors precipitating Goetz' discharge.

It is undisputed that Respondent overheard Goetz' remark in the June 20 salesmen's meeting, held shortly before his discharge, that Tim Pring, Respondent's highest ranking official charged with daily management of the dealership, was "just a little rich son of a bitch and he's never had to work a day in his life." Nevertheless, the Administrative Law Judge concluded that Respondent had unlawfully determined to discharge Goetz prior to this disparaging remark. The Administrative Law Judge stated further, however, that he was unable to determine whether the disparity between Respondent's treatment of Arthur, Berry, and Goetz (i.e., ordering Arthur and Berry, but not Goetz, to return to work after their initial discharge) was because Respondent believed Goetz was the main union instigator or was because of his derogatory remark about Tim Pring. The Administrative Law Judge therefore concluded that Respondent had failed to meet its burden of showing that Goetz would have been discharged even in the absence of his union activities.

Respondent excepts to the Administrative Law Judge's findings with respect to Goetz and claims that the General Counsel prevailed without establishing a *prima facie* case by a preponderance of the evidence.

Goetz' documented union activities prior to his discharge included accompanying Arthur and Berry in their delivery of an updated list of the names and addresses of Respondent's salesmen to Union Business Agent DeLauder on June 19 and meeting with other salesmen on the evening of

thought were the "best salesmen" at the dealership. We correct his error and note that the question actually posed was who he thought were the "better salesmen" at the dealership.

² In his Decision, the Administrative Law Judge discussed the different approaches used by the United States Courts of Appeals for the First and Third Circuits and the Board regarding the proper burden to be placed on a respondent in an unlawful discrimination case once the General Counsel has established his *prima facie* case. We adhere to the Board's view of the proper mode of analysis in these cases; however, to the extent that the First and Third Circuits may be viewed as adhering to a different standard as to Respondent's burden, we note that under either standard the evidence plainly preponderates in favor of the General Counsel's contention that the discharges were effectuated to thwart the discharges' union activities. We therefore deny Respondent's request for oral argument regarding the application of *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980), to this case.

June 19 in a casual setting, at which time the Union was discussed. According to Nort Hall, Respondent's new-car sales manager during the relevant period, whose testimony was credited by the Administrative Law Judge, management had discussed Arthur and Berry on June 19, had concluded that they were the instigators of the union talk, and had decided to find a way to terminate them as soon as possible.³ Additionally, Tim Pring inquired of Arthur on the morning of June 20, after rescinding Arthur's and Berry's discharges, but not Goetz', whether Goetz was the one who had contacted the Union. In response to Arthur's answer that he did not know, Tim Pring stated, "I think we've solved our Union problem. We've gotten rid of a troublemaker now so I think everything is going to be all right." The Administrative Law Judge found that Tim Pring's reference to "a troublemaker" was to Goetz.

Thus, even though Respondent offered a legitimate reason for the discharge (i.e., Goetz' disparagement of Tim Pring), we conclude that the evidence *in toto* preponderates in favor of finding that Respondent terminated Goetz because of his union activities, not because of his disparaging remark. Further undermining Respondent's defense is the evidence of disparate treatment. Salesman Norm Backlund made disparaging remarks about Jack Pring at the same June 20 salesmen's meeting. Tim Pring overheard these remarks as well, but no disciplinary action was taken against Backlund. Although Respondent now attempts to distinguish Backlund's remark from Goetz' as less personal and less offensive, we find that the disparate treatment afforded Goetz and Backlund lends further credence to our conclusion that the preponderance of the evidence establishes that Goetz' discharge was precipitated by his union activity.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Appleyway Chevrolet, Inc., Spokane, Washington, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 2(a):

"(a) Offer Fred Arthur, Bill Berry, and Paul Goetz, Jr., full and immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions,

³ We note that the Administrative Law Judge inadvertently identified this date as June 17, rather than June 19.

with full seniority, privileges, and benefits, and make them whole for any losses they may have suffered because of the discrimination against them in accordance with the provisions set forth in the section of this Decision entitled 'The Remedy.'"

2. Substitute the attached notice for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discharge or otherwise discriminate against employees for supporting or engaging in activities on behalf of Driver Salesmen, Warehousemen, Food Handlers, Clerical and Industrial Production; Spokane & Vicinity, Washington & the Five Northern Counties of Idaho, Local #582, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

WE WILL NOT interrogate employees about their union sympathies and activities or the union sympathies or activities of other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Fred Arthur, Bill Berry, and Paul Goetz, Jr., full and immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, with full seniority, privileges, and benefits, and WE WILL make them whole for any losses they may have suffered because

of the discrimination against them, plus interest.

WE WILL expunge from our files any reference to the discharges of Fred Arthur, Bill Berry, and Paul Goetz, Jr., in June 1981, and WE WILL notify each of them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against any of them.

APPLEWAY CHEVROLET, INC.

DECISION

STATEMENT OF THE CASE

JAY R. POLLACK, Administrative Law Judge: This case was heard before me in Spokane, Washington, on March 18 and 19, 1982. Pursuant to a charge filed against Appleyway Chevrolet, Inc. (Respondent), by Driver Salesmen, Warehousemen, Food Handlers, Clerical and Industrial Production; Spokane and Vicinity, Washington & the Five Northern Counties of Idaho, Local #582, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), on June 25, 1981,¹ the Acting Regional Director for Region 19 of the National Labor Relations Board (the Board) issued a complaint against Respondent on August 12, alleging that Respondent committed certain violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, 29 U.S.C. § 151, *et seq.* (the Act).

The Issues

The principal questions presented for decision are:

(1) Whether Respondent violated Section 8(a)(1) of the Act by interrogating employees regarding union membership, activities, and sympathies.

(2) Whether Respondent violated Section 8(a)(1) and (3) of the Act by discharging employees Fred Arthur, Bill Berry, and Paul Goetz, Jr., because of their union activities.

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record, from my observation of the demeanor of the witnesses, and having considered the post-hearing briefs of the General Counsel and Respondent, I make the following:

FINDINGS OF FACT AND CONCLUSIONS

I. JURISDICTION

At all times material herein, Respondent has been a Washington corporation, with an office and principal place of business located in Spokane, Washington, where it is engaged in the retail sale and service of new and used automobiles. In the 12 months preceding issuance of the complaint, Respondent derived gross revenues in

excess of \$500,000 and sold and shipped goods valued in excess of \$50,000 to customers outside the State of Washington. Accordingly, Respondent admits and I find that it is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that at all times material herein the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Introduction

As discussed above, Respondent is engaged in the operation of an automobile dealership. Arthur, Berry, and Goetz were employed by Respondent as salesmen. Arthur first worked for Respondent from January 1978 until July 1979 when he left to go into another business. Arthur was rehired by Respondent in November 1980 and worked there until his discharge in June 1981. Berry first worked for Respondent from January 1978 until August 1979 when he left for another job. Berry was rehired in August 1980. Goetz first worked for Respondent from July 1978 until he quit in September 1979 to start his own business. Goetz was rehired by Respondent in September 1980.

Respondent's president and chief executive officer is Jack Pring. J. Pring is involved in various other businesses and has turned over operation of the dealership to his son Tim. Next in the chain of command is George McConahy, Respondent's general manager. Respondent operated a new-car division and a used-car division in separate buildings. The sales force consisted of between 17 and 19 salesmen who sold both new and used cars. During the time material herein, Nort Hall was new-car sales manager. In April, Max Landes became used-car sales manager. In August, Landes became new-car sales manager replacing Hall. Thereafter, Hall left for employment at another dealership.

B. The Discharges

Respondent's salesmen first began discussing unionization in February. In late February, Arthur contacted John DeLauder, a business agent with the Union. On March 5, DeLauder, using a list of names and addresses provided by Arthur, mailed a letter to all of Respondent's salesmen inviting them to attend a meeting on March 10 at the Union's office in Spokane, Washington.

On March 9, at a regularly scheduled sales meeting, T. Pring told the employees that he was aware of the Union's letter and that the employees were "thinking about getting a union in here."² T. Pring asked the em-

² The factual findings herein are based on the record as a whole and my observation of the witnesses. I have credited the testimony of Arthur, Berry, and Goetz, all of whom testified in a candid and straightforward manner. McConahy, on the other hand, testified in self-serving and eva-

Continued

¹ Unless otherwise stated, all dates refer to calendar year 1981.

ployees to give him a "chance" and think about what they were doing. The next morning T. Pring held another meeting with the salesmen. T. Pring asked the employees to give him a chance to make the dealership a better place to work. T. Pring further asked that the salesmen not go to the union meeting scheduled for that evening. The employees asked T. Pring to leave the room. In T. Pring's absence, the employees voted unanimously not to attend the union meeting. T. Pring was called back into the meeting and told that the employees would give him a chance and that they would not attend the union meeting. T. Pring thanked the employees and said that, if he did not improve conditions at the dealership, the employees could always get the Union back.

However, in May and June, the employees again began discussing unionization. In June, Arthur again contacted DeLauder. On the afternoon of June 19, Arthur delivered to DeLauder an updated list of the names and addresses of Respondent's salesmen. Berry and Goetz accompanied Arthur on this visit. DeLauder gave the employees some union authorization cards. Each of the three employees filled out a card and gave it to DeLauder. That same day, DeLauder mailed letters to each of Respondent's salesmen inviting them to a meeting on June 23.

On the evening of June 19, Arthur, Berry, Goetz, and three other salesmen, Lloyd Drake, Norm Backlund, and Dan O'Brien, got together for some beer and pizza. Although this get-together was not a union meeting, the Union was casually mentioned. On the morning of June 20, Respondent's salesmen held a meeting to discuss coverage of the sales showroom floor. The employees discussed ways of "policing themselves" so that salesmen would take customers on rotation and that the showroom would be taken care of to the satisfaction of management. During a discussion of the possibility that management might hire more salesmen and thereby cause commissions to be spread thinner, Goetz said, "Tim can't understand what it's like. He's just a little rich son of a bitch and he's never had to work a day in his life." Unbeknownst to the salesmen, T. Pring was about to enter the room in order to bring the salesmen back to their duty stations. T. Pring entered the room and asked what was going on. T. Pring was told that the salesmen were talking about policing themselves and straightening out problems of coverage of the showroom floor. T. Pring said he heard Goetz call him a "rich little son of a bitch" and heard Norm Backlund say that Jack Pring had a hard time deciding where he was going on vacation, not whether or not he could pay his bills. Pring then said that the employees just "wanted to bitch and complain and talk about the Union instead of getting out and doing [their] work."

sive manner—so much so that I do not credit McConahy in any instance except where his testimony is consistent with other credible evidence.

The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *N.L.R.B. v. Walton Manufacturing Co. et al.*, 369 U.S. 404, 408 (1962). As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with credited documentary or testimonial evidence or because it was in and of itself incredible and unworthy of belief.

Shortly after this meeting, Dan O'Brien went to talk to T. Pring and asked him not to take Goetz' comment personally. T. Pring asked O'Brien what the meeting was about. O'Brien said the meeting was called so that the salesmen could police themselves and straighten out coverage of the showroom before management took adverse action. T. Pring then asked, "How about the union meeting last night?" O'Brien answered that there had been no meeting the night before.

Shortly after the meeting, Tom Showalter, a salesman, went to talk to T. Pring about Goetz' comment. Showalter tried to calm T. Pring down and told T. Pring that Goetz did not mean what he said. T. Pring asked if Showalter had heard anymore talk about the Union. Showalter said, "Yes, there was talk about union at the dealership." T. Pring asked who was involved but Showalter said he would not mention any names. T. Pring said that he had made a "decision," that Showalter was not included in the decision, and that the decision was easier because Showalter was not included. T. Pring then asked who Showalter thought were the best salesmen at the dealership. Showalter named Goetz, Arthur, Berry, Lloyd Drake, and Norm Backlund.

Goetz was terminated shortly after these conversations. Goetz testified that McConahy, and Nort Hall, new-car sales manager, asked him to come into McConahy's office. McConahy said, "I've been looking over your record . . . and we need more production. We are making some changes and . . . I'm going to terminate you. We're going to have to let you go." McConahy told Goetz that he was being terminated for low production.

That same morning, Hall told Arthur to go see McConahy. McConahy, in Hall's presence, told Arthur that Respondent needed more sales from its salesmen and that Respondent would have to let some people go. McConahy said, "So we're going to let you go for lack of productivity." Arthur said, "Okay" and McConahy told Arthur to turn in his dealer license plates and car keys.

McConahy and Hall then went to terminate Berry. McConahy told Berry that Respondent had decided to make changes and was looking for more aggressive and younger salesmen. Berry interrupted and asked whether he was being fired. McConahy answered yes and Berry asked, "For what reason?" McConahy answered, "Non-production." Berry became argumentative and asked for the real reason for the discharge. At that time, Arthur was walking by the office and McConahy called Arthur into the room. Berry said that he could not be fired for lack of productivity because he was a good salesman and McConahy knew that. Berry demanded the real reason for his discharge. McConahy said, "Well, we've always looked at you guys as being good substantial salesmen but you're complaining, you're bitching and moaning about everything. Just like this meeting this morning." Berry said, "We didn't call this meeting this morning." McConahy asked who called the meeting. Berry and Arthur said that Dan O'Brien and Ren Hager had called the meeting. McConahy then said, "Maybe we got things mixed up here." McConahy asked Arthur, "What about

the union meeting at your house last night?" Arthur said there was no union meeting and that several of the salesmen had simply gone out together for pizza. McConahy said, "Maybe we made a mistake. We've got the wrong people if these guys didn't do this." McConahy then told the two salesmen to forget the whole thing and go back to work. McConahy asked for a commitment that the salesmen would work harder. Arthur answered that he already was working 12 hours a day. McConahy agreed that the employees were committed and sent them back to work. Arthur retrieved his dealer plates.

A couple of hours later, T. Pring called Arthur into an office. There, T. Pring and McConahy said they wanted to talk to Arthur. Arthur asked if he were going to be fired. T. Pring said no, that he only wanted to ask Arthur some questions. T. Pring asked how Arthur felt about the dealership. Arthur answered that he liked the dealership, otherwise he would not be working there. T. Pring asked how Arthur felt about the management. Arthur answered that he had no problems with management, except Nort Hall. Arthur said that Hall frequently cursed him and called him names. T. Pring asked how Arthur felt about the Union. Arthur said he thought the Union would "never go through." T. Pring asked how Arthur had felt about the Union 2 months before. Arthur answered that at that time he was for the Union. T. Pring asked if Arthur knew who contacted the Union and Arthur answered that he did not. T. Pring asked if Goetz had contacted the Union and Arthur said he did not know. T. Pring then told McConahy, "I think we've solved our Union problem. We've gotten rid of a troublemaker now so I think everything is going to be all right." T. Pring told Arthur to go back to work. Hall walked by and T. Pring asked Arthur to report what he had previously said about Hall. At T. Pring's urging, Arthur told Hall, "Nort, you cuss me too much." Hall said that he did not realize he was doing it, but, if he was, he would stop. Hall walked away and T. Pring asked Arthur, "Is that all?" Arthur answered, "You know I think it's very chicken shit, the way we were fired this morning and I really don't understand it the way you would just walk in, as hard as we work for you, and just could say you're letting us go for lack of productivity. You know we're good salesmen." T. Pring explained by saying, "If you've got a Black person working for you and you want to get rid of him, you can't go out and tell that guy hey, you're Black and I want to get rid of you. So you go in and tell him it's lack of production." Arthur then told T. Pring that Goetz did not really mean what he said that morning. T. Pring said that he was going to let things (Goetz' discharge) stand and that Arthur had no complaint since he was still working. As he was leaving, Arthur asked T. Pring if he had lost his seniority for vacation purposes. T. Pring laughed and said no.³

Arthur remained at work on June 20 and sold a motorcycle. The next day, Sunday, June 21, Arthur, Berry, Goetz, and O'Brien solicited union authorization cards

³ The above account of this conversation is based on the credited testimony of Arthur which T. Pring did not effectively deny. T. Pring admitted making the statement with regard to the discharge of Blacks. McConahy's denials illustrate his lack of candor and are not credited.

from employees at the employees' homes. The signed authorization cards were delivered to DeLauder later that evening.

On Monday, June 22, DeLauder and Dick Solbert, a business representative for the Union, went to see T. Pring. DeLauder introduced himself and told T. Pring that the Union had signed authorization cards and that Respondent would be receiving information from the Board including a notice for posting. DeLauder told T. Pring that Respondent should make no changes in wages, hours, and conditions of employment for the salesmen. DeLauder asked T. Pring to give consideration to taking Goetz back as a salesman. T. Pring asked if DeLauder were finished and DeLauder answered yes. They shook hands and the union officials left.⁴

Approximately 11 that same morning, McConahy asked to speak with Arthur. McConahy said, "Fred, I've thought about this all weekend and I think we're going to have to go ahead and let you go for lack of productivity." Earlier that morning, McConahy had congratulated Arthur on Arthur's sale of a motorcycle on Saturday, June 20.

About 10:30 a.m., McConahy told Berry that Berry was being terminated for "non-production." Berry told McConahy that he thought it was a "chicken shit thing" to do. Berry asked O'Brien to come into the office. Berry then asked McConahy to repeat the reason for the termination. McConahy said, "We're firing Bill because of non-production."

C. Respondent's Defense

Respondent does not contend that the salesmen were terminated because of lack of production.⁵ Rather, Respondent contends that the three employees were discharged because the sales force lacked the necessary spirit of cooperation. Respondent contends that "management didn't seem to be able to ever do anything right with these particular fellows."

It is Respondent's position that Jack Pring made the decision to terminate the three employees. Tim Pring testified that, on the morning of June 20, he went to get the salesmen from their meeting to go back to work. Before entering the room, T. Pring heard Goetz refer to him as a "rich kid son of a bitch." T. Pring remained outside

⁴ T. Pring testified that he told DeLauder that two other salesmen had already been terminated. DeLauder denied being given such information by T. Pring. I credit DeLauder's testimony over that of T. Pring.

⁵ Respondent's sales records reveal that the three salesmen were not Respondent's lowest producers. Goetz did rank last in sales among the salesmen for June. However, he only worked until June 20. Goetz ranked 11th in May and 2d in April of Respondent's 17 salesmen.

Respondent's internal personnel records indicate that all three employees were terminated for lack of production. With regard to Goetz, McConahy noted, "terminated for lack of production, sold 2 units in 20 days of June." With regard to Berry, McConahy listed the date of termination as June 22 and the reason for termination as "lack of production, sold 5 vehicles in May—only 1 new." Arthur's date of termination was June 22 and the reason for termination was "lack of production, sold 5 vehicles in May—only 1 new." Notwithstanding that Berry and Arthur were terminated on June 22, they ranked 6th and 11th, respectively, in sales among Respondent's 17 salesmen for the month of June.

In Respondent's report to the State of Washington Employment Security Department, on July 15, McConahy gave as the reason for Goetz' discharge, "poor production—lack of sales."

the meeting room and listened to the employees. T. Pring heard Backlund say that the only thing Jack Pring had to worry about was where he was going to spend his next vacation. When T. Pring first walked into the meeting he attempted to act as if he had not heard anything. T. Pring asked what was going on and the salesmen answered that they were discussing policing themselves and coverage of the sales floor. T. Pring asked if they had any problems about management. Finally, T. Pring told Goetz that he heard Goetz call him a "rich kid son of a bitch." T. Pring directed comments to Backlund and Berry as well. Thereafter, the salesmen left the room and the meeting broke up.

After the meeting, O'Brien and then Showalter each talked to T. Pring and attempted to calm T. Pring down. T. Pring did not effectively deny O'Brien's account of their conversation. Nor did T. Pring deny Showalter's account of their conversation. T. Pring testified that he did not recall asking Showalter who supported the Union but that he may have asked that question. Then T. Pring proceeded to testify that Showalter answered that he (Showalter) would not give T. Pring any names. According to T. Pring, he had already decided to fire Goetz, Arthur, and Berry.

After speaking with O'Brien and Showalter, T. Pring went to see McConahy. T. Pring told McConahy what Goetz had said about T. Pring and that Goetz, Arthur, and Berry were the three complainers. T. Pring told McConahy that he thought the three salesmen should be terminated. According to T. Pring, McConahy said it would be done. T. Pring then spoke to his father, Jack Pring. According to T. Pring, J. Pring said to go ahead and fire the three salesmen.

T. Pring did not effectively deny Arthur's version of their conversation late that afternoon. Rather than deny that he questioned Arthur about the Union, T. Pring simply stated that he did not recall doing so. T. Pring admitted that he told Arthur that, if an employer wanted to fire a Black, it could do so by saying that the employee was being fired for low productivity. T. Pring explained that during discussions with his attorney in March,⁶ he was told that, if an employee were fired for low productivity, it would cause the employee less trouble in finding another job than if the real reason were stated.

As stated earlier, I do not credit McConahy's testimony. His testimony is set forth below only for the purpose of showing Respondent's defense. McConahy testified that on June 19, upon learning that the salesmen were going to have a meeting, he decided to terminate Goetz, Arthur, and Berry. According to McConahy he discussed this decision with Max Landes, the used-car sales manager.⁷ Thereafter, McConahy learned that T. Pring agreed to let the employees have a meeting to police themselves and initiate a system for better coverage of the sales floor.

⁶ T. Pring testified that, in March, he discussed with Gary Lofland, Respondent's attorney, matters concerning union organizing. According to T. Pring and McConahy, Lofland told them to give terminated employees "low productivity" as the reason for discharge.

⁷ Landes did not recall any such discussion.

After the salesmen's meeting of June 20, T. Pring told McConahy that Goetz had called him a "rich kid son of a bitch." McConahy said that Goetz should be fired immediately. McConahy called in Goetz and told Goetz that he was fired for low productivity. According to McConahy, he did not want to get into "a name-calling personality conflict," therefore, McConahy made no mention of Goetz' name-calling of T. Pring. According to McConahy, based on conversations with Respondent's attorney, low productivity would be used as the reason for discharge so that terminated employees would not be harmed in seeking employment.

McConahy later called Jack Pring and said that he had wanted to terminate Berry and Arthur. According to McConahy, Jack agreed to these changes. Thereafter, Jack called back and spoke to Tim. McConahy then proceeded to terminate Arthur and Berry. According to McConahy he told Arthur and Berry that they could come back in on Monday. McConahy told Arthur and Berry that he would review their discharges over the weekend, but, at that point, Respondent would stick to the decision to discharge them. McConahy testified Berry and Arthur were supposed to come in on Monday, because they may have had some deals in the mill. According to McConahy, Arthur had the motorcycle customer coming in that afternoon.⁸ According to McConahy, Arthur and Berry could report to work Monday, and if he did not change his mind they would be terminated, but, if he changed his mind, they would sit down and talk about it.

Jack Pring testified that on June 20, 1981, he was in Lewiston, Idaho. McConahy called Jack and said that there was a problem at the dealership. When asked what the problem was, J. Pring testified, "Management didn't seem to be able to ever do anything right with these particular fellows." J. Pring told McConahy to "get it over with." Shortly thereafter, J. Pring called the dealership and spoke to Tim. Tim told Jack what he had overheard Goetz call him at the salesmen's meeting. According to Jack, he told Tim that he wanted "this thing wound up today." According to Jack, he returned to the dealership just in time to hear McConahy tell Arthur and Berry that McConahy would review the discharges again the following Monday. Jack Pring waited for McConahy and then met with Tim and McConahy. Jack told Tim and McConahy to stick with their decision to fire Berry and Arthur. J. Pring gave the name-calling of his son and "nit-picking" as the reasons for the terminations. J. Pring first testified that the three employees were causing a lack of productivity in the other salesmen. Then J. Pring shifted his defense and testified that the sales of the three were not satisfactory. J. Pring did not explain why salesmen with lesser sales were retained.

Nort Hall, new-car sales manager from April 1974 until August 1981, was called as a witness by the General Counsel. Hall testified that McConahy showed him a copy of DeLauder's letter scheduling a union meeting for March 10. According to Hall, McConahy informed

⁸ In actuality, Arthur and McConahy did not know that the customer for the motorcycle was coming in, until some time after Arthur was told to continue working.

the management team that he would have an observer inform management as to the identity of those attending the union meeting. Thereafter, McConahy told Hall that none of Respondent's employees attended the scheduled meeting.

Hall testified that talk of the union resurfaced in May or June. He said that management had discussed Goetz, Berry, and Arthur and one or two others as the employees behind the union talk. Hall testified that, on June 17, the management discussed the upcoming meeting of the salesmen. It was mentioned that the meeting might have some connection to the Union. Goetz, Berry, and Arthur were mentioned as creating the "problem" and that Respondent would have to find a way to terminate the three men, as soon as possible. When questioned as to what he meant by the "problem," Hall answered that "there was no doubt as to what the problem was . . . outside activities." Hall explained that outside activities referred to union activities. Hall corroborated the testimony of Berry and Arthur that their terminations were canceled on June 20. Although Respondent attempted to impeach Hall as biased against it, I credit Hall's testimony. First, Hall appeared much more credible than McConahy. Further, Hall's testimony was consistent with the credible testimony of Arthur and Berry where they testified to the same events. Hall did not appear to be hostile to Respondent while testifying. Finally, Respondent points to the deterioration of relations between Respondent's dealership and Hall's current employer, as evidence of Hall's bias. However, such deterioration may be attributed to other factors, including a change in the ownership of Hall's present employer.

D. Conclusions Regarding 8(a)(1) Issues

As found earlier, on June 20, McConahy asked Arthur, "What about the union meeting at your house last night?" When Arthur denied having a union meeting, McConahy said that maybe he made a mistake. McConahy then decided to rescind the terminations of Arthur and Berry.

On June 20, T. Pring questioned employee Dan O'Brien, "How about the union meeting last night?" Shortly thereafter, T. Pring asked Tom Showalter if Showalter had heard any more about the Union. T. Pring then asked who was involved but Showalter would not supply any names. After Arthur's discharge was canceled, T. Pring asked how Arthur felt about the Union. Then T. Pring asked who contacted the Union. After receiving no further information from Arthur, T. Pring said that the union problem was solved by getting rid of a troublemaker. Under all of the circumstances, the questioning of employees by McConahy and T. Pring creates the impression that Respondent sought information upon which to base actions against individual employees. See *N.L.R.B. v. Los Angeles New Hospital*, 640 F.2d 1017, 1020 (9th Cir. 1981). Accordingly, I find that by this conduct Respondent violated Section 8(a)(1) of the Act.

E. Conclusions Regarding the Discharges

The critical issue herein is Respondent's motive for discharging Goetz, Arthur, and Berry. In such cases the General Counsel must make a *prima facie* showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Upon such a showing, the burden shifts to the employer to prove that the same action would have taken place even in the absence of the protected conduct. *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).⁹

I find that the General Counsel has established a *prima facie* showing that all three salesmen were discharged for their union activities. Respondent does not contend, nor does the record support a finding, that the employees were discharged for lack of production. Respondent's patently false reason for the discharges supports an inference that it had an unlawful motive for the discharges. See, e.g., *Bacchus Wine Cooperative, Inc.*, 251 NLRB 1552, 1556 (1981); *Keller Manufacturing Co., Inc.*, 237 NLRB 712, 713 (1978). See also *Shattuck Denn Mining Corp. v. N.L.R.B.*, 362 F.2d 466, 470 (9th Cir. 1966). As T. Pring stated to Arthur, Respondent used lack of productivity as the reason for a discriminatory discharge because the real reason could not be stated. I do not credit Respondent's self-serving statement that its intent was to prevent further harm to the employees' ability to obtain other employment. Respondent, by McConahy, put the false reasons with details from its sales records on its own internal personnel forms.¹⁰ Such action would not be necessary to aid the employees' search for work. Rather, Respondent could give "low productivity" or no reason to prospective employers. Prospective employers would have no access to Respondent's internal records, containing either false or accurate reasons for personnel actions.

The timing of the discharges buttresses the conclusion that Respondent was motivated by the recent union activities among its employees. I am not persuaded by Respondent's contention it thought that union activities had terminated after T. Pring's "give me a chance" speech of March 10. On June 20, T. Pring questioned employees

⁹ In enforcing the Board's *Wright Line* decision, the United States Court of Appeals for the First Circuit (662 F.2d 899 (1981)) stated that the burden on the employer is the "burden of production," which requires the employer to come forward with credible evidence to rebut or meet the General Counsel's *prima facie* case, rather than the "burden of persuasion." The Board's view has been accepted by two circuit courts: *N.L.R.B. v. Nevis Industries, Inc.*, 647 F.2d 905 (9th Cir. 1981); *N.L.R.B. v. Fixtures Manufacturing Corporation*, 669 F.2d 547 (8th Cir. 1982). The Third Circuit has adopted the First Circuit's view. See *Behring International v. N.L.R.B.*, 675 F.2d 83 (3d Cir. 1982). However, it is well settled that it is the duty of an administrative law judge "to apply established Board precedent which the Supreme Court has not reversed." *Los Angeles New Hospital*, 244 NLRB 960, 962, fn. 4 (1979), citing *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616 (1965).

¹⁰ On July 15, after the filing of the instant charge, McConahy gave the State Department of Employment Security the false reason for Goetz' termination. I note that under the laws of the State of Washington (RCW 50 36.030), Respondent or McConahy would have been guilty of a misdemeanor if McConahy had given the state agency a cause for termination contrary to that given Goetz. Under the circumstances of the Federal and state laws, it seems unlikely that Respondent's attorney, experienced in labor and employment matters, counseled McConahy to give false reasons for discharges.

about a perceived union meeting the previous night. T. Pring told Arthur that he thought he had solved the union problem by getting rid of a troublemaker (Goetz). Further, Hall testified that, on June 19, it was decided to terminate Goetz, Arthur, and Berry because their outside activities, i.e., union activities, were a disruptive force. Finally, after the discharges of Berry and Arthur were rescinded, both employees were immediately discharged after DeLauder told T. Pring that the Union represented Respondent's sales personnel.

I find no merit in Respondent's contention that union animus has not been shown. As can be readily seen, McConahy decided to terminate the employees because their union activities were deemed to be disruptive. Further, Respondent unlawfully interrogated employees about union meetings and the identity of the employee leaders. T. Pring admitted to Arthur that Respondent attempted to solve its union problem by getting rid of the troublemaker. Such conduct provides more than a sufficient basis for finding that the discharges were intended to discourage membership in or activities on behalf of the Union. Thus, the burden shifts to Respondent to prove that the discharges would have taken place in the absence of the employees' union activities.

Respondent contends that Jack Pring decided to terminate the employees because of their poor attitudes. I cannot give credence to such an argument. McConahy had determined to discharge Arthur, Berry, and Goetz on June 19, because of their outside union activities. When Arthur and Berry denied having a union meeting, McConahy said maybe he had made a mistake and agreed to cancel their discharges. Thus, on June 20, the attitudes of Berry and Arthur were acceptable. On the morning of June 20, McConahy complimented Arthur on the sale of a motorcycle. However, after the union agents told T. Pring of the employees' interest, Berry and Arthur were again terminated for a false reason. In sum, I find that Respondent has not rebutted the *prima facie* case, and, therefore, that Respondent violated Section 8(a)(3) of the Act in discharging Arthur and Berry. The case with respect to Goetz is more difficult.

The question remains as to whether Goetz would have been terminated in the absence of his union activities because of his "rich kid son of a bitch" remark. Prior to the utterance of that remark, McConahy had unlawfully determined to discharge Goetz. Further, McConahy did not mention the remark in discharging Goetz or in reporting the discharge to the state agency. Although Norm Backlund had made a derogatory statement against J. Pring, Backlund was not discharged or otherwise disciplined. Thus, even though Respondent dealt more decisively with Goetz than with Arthur and Berry, I am unable to determine whether the disparity is explained by Goetz' perceived leadership in the union activities or by Goetz' remark about T. Pring. Accordingly, I find that Respondent has not met its burden of showing that Goetz would have been discharged even in the absence of his union activities. Therefore, I find that Respondent violated Section 8(a)(3) of the Act in discharging Goetz.

CONCLUSIONS OF LAW

1. Respondent Appleway Chevrolet, Inc., is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Driver Salesmen, Warehousemen, Food Handlers, Clerical and Industrial Production; Spokane and Vicinity, Washington & the Five Northern Counties of Idaho, Local #582, affiliated with International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(3) and (1) of the Act by unlawfully discharging employees Paul Goetz, Jr., Fred Arthur, and Bill Berry in order to discourage membership in or activities on behalf of the Union.

4. Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees about their union activities and the union activities of other employees.

5. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action to effectuate the policies of the Act.

Respondent shall be required to offer Fred Arthur, Bill Berry, and Paul Goetz, Jr., reinstatement to their former jobs, without prejudice to their seniority or other rights and privileges and to make them whole for any losses they may have suffered as a result of the discrimination against them in the manner set forth in *F. W. Woolworth Company*, 90 NLRB 289 (1950), with interest computed in the manner set forth in *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER¹¹

The Respondent, Appleway Chevrolet, Inc., Spokane, Washington, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees for supporting or engaging in activities on behalf of Driver Salesmen, Warehousemen, Food Handlers, Clerical and Industrial Production; Spokane and Vicinity, Washington & the Five Northern Counties of Idaho, Local #582, affiliated with International Brother-

¹¹ In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

hood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, or any other labor organization.

(b) Interrogating employees about their union sympathies and activities or the union sympathies or activities of other employees.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Fred Arthur, Bill Berry, and Paul Goetz, Jr., full and immediate reinstatement to their former positions with full seniority, privileges, and benefits and make them whole for any losses they may have suffered because of the discrimination against them, in accordance with the provisions set forth in the section of this Decision entitled "The Remedy."

(b) Expunge from its files any reference to the discharges of Arthur, Berry, and Goetz in June 1981, and notify each of them in writing that this has been done and that evidence of these unlawful discharges will not be used as a basis for future personnel actions against any of them.

(c) Post at its Spokane, Washington, facility copies of the attached notice marked "Appendix."¹² Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(d) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due and the right of reinstatement under the terms of this Order.

(e) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

¹² In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."